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In The

Supreme Court of the United States

October Term, 1991

JOHN K. YEE and IRENE S. YEE, et al.,

Petitioners,

v.

CITY OF ESCONDIDO,

Respondents.

On Appeal From The California Court of Appeal

BRIEF AMICUS CURIAE OF WESTERN MOBILEHOME ASSOCIATION IN SUPPORT OF PETITIONERS

MICHAEL A. WILLEMSEN, ESQ.*
LAW OFFICE OF MICHAEL WILLEMSEN
285 Hamilton Avenue, Suite 440
Palo Alto, CA 94301
(415) 325-4492

DAVID SPANGENBERG, ESQ.*
LAW OFFICES OF DAVID SPANGENBERG
285 Hamilton Avenue, Suite 440
Palo Alto, CA 94301
(415) 325-4491

* Counsel of Record

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BRIEF AMICUS CURIAE OF WESTERN MOBILEHOME ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS[1]

The Western Mobilehome Association is a nonprofit organization formed in 1945 to promote the interests of mobilehome park owners, operators, and residents in California through the sponsorship of educational programs, the collection and dissemination of information and publications of interest to mobilehome park owners and tenants, and by participation in the legislative and judicial process when the interests of the membership is at stake. It has approximately 2000 members who provide

[1] This brief is submitted with the written consent of all parties filed with the Clerk of the Court.

the public with approximately 225,000 mobilehome rental spaces.

The Western Mobilehome Association and its members are vitally concerned with the Court's determination of this case. Many of its members own mobilehome parks in cities and counties which impose controls on the rents which can be charged; about half of these jurisdictions also prevent an owner from increasing the mobilehome pad rent when the mobilehome is sold, or limit the increased rent to less than market rates. (We refer to such provisions as "vacancy control" provisions.) These rent and vacancy control provisions compel the owner to rent his space to mobilehome purchasers for less than market rates, decreasing his income, diminishing the value of his property, and discouraging him from investing in that property. Several members of the association have filed suits challenging local vacancy control provisions, which cases await the Court's decision in the present case.

If this Court holds that vacancy control provisions do not constitute a taking without just compensation, and do not deny owners due process of law, we have no doubt that many more communities will enact vacancy control. We can foresee a future in which most of our members are locked into investments in which the rents they can charge fall further and further behind market rates each year, while their tenants sell their mobilehomes for premium prices which include the possessory value of a rent-controlled pad in the owner's park.

SUMMARY OF ARGUMENT

This case involves the question whether vacancy control ordinances for mobilehome parks may constitute either a taking of property without just compensation, or a violation of substantive due process. We hope to assist the Court in deciding that question by (a) summarizing the characteristics of the mobilehome business, (b) explaining the matrix of state laws and local regulation from which this case arises, (c) explaining the economic

theory which forms the basis for the concept that the sale of a mobilehome at a premium price under vacancy control represents a taking of a property interest of the park owner, and (d) showing that in practice mobilehomes in vacancy control jurisdictions do sell for such a premium.

From this analysis we draw three contentions: First, we contend that requiring a park owner to rent to persons whom he has not selected and does not approve is a taking by physical invasion of his rights of possession and exclusion, and that vacancy control laws, by denying him just compensation for that taking, render that taking unconstitutional. Second, we contend that the vacancy control provision should also be found unconstitutional if measured against the standards for a regulatory taking, because it does not advance a legitimate state purpose of providing low and secure rents, but only the illegitimate purpose of taking property from the owner for the benefit of those tenants owning mobilehomes at the time of its enactment. Third, because the ordinance fails to serve a legitimate purpose, we believe a trial court could find that it lacks the rationality required by the Due Process Clause.

ARGUMENT

I. CHARACTERISTICS OF THE MOBILEHOME PARK BUSINESS

The use of mobilehomes as residences began in earnest after World War II, and increased during the 1950's and 1960's. (Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 *UCLA L. Rev.* 399, 403 (1988) (hereinafter cited as Hirsch & Hirsch)). The units were originally travel trailers that could readily be moved from park to park. *Id.* But during the 1960's and 1970's, when most California mobilehome parks were established (*see California Department of Housing and Community Development, A Survey of Mobilehome Park Owners Pursuant to SB*

1835, at 1 (1986)) (hereinafter Survey), trailers were replaced by larger units which "are akin to pre-fabricated or manufactured housing in that they are seldom, if ever, removed." Hirsch & Hirsch, *supra*, at 403. Relocating a mobilehome from one park to another is a complex process which costs in the range of $1000-$3000. Hirsch & Hirsch, *supra*, at 404-405. As Judge Kozinski noted in *Azul Pacifico, Inc v. City of Los Angeles*, 91 Daily Journal D.A.R. 13599 (9th Cir. Nov. 1, 1991) "The mobile homes themselves really aren't: Moving a coach is a substantial and expensive undertaking."

Most mobilehomes – from 90 to 95 percent – are owned by the tenants. Hirsch & Hirsch, *supra*, at 405. The tenants themselves fall into two groups: young families seeking low-cost housing, and senior citizens. *Id.* at 414. Nationally 41 percent of mobilehome park residents are 50 years or older and 26 percent are retired; in California 76 percent are 50 or older and 56 percent retired. *Foremost Insurance Group, Manufactured Housing Outlook for 1991*. For both young families and older persons, the purchase of a mobilehome may enable the purchaser to acquire a residence at a cost which is typically less than the cost of renting a similarly sized and outfitted apartment.

When the tenant wants to move out, he or she will generally sell the mobilehome, not remove it from the park. Thus mobilehomes remain in place for years and are passed from tenant to tenant. Less than 1 percent are ever moved. Hirsch & Hirsch, *supra*, at 405. In contrast, about 11 percent of the tenants move every year. Survey, *supra*, at 17.

These unique circumstances in the mobilehome business make it easy for a mobilehome park tenant to profit from the sale of a site in a mobilehome park through selling his coach at an inflated price. *See* McAllister, *Hall v. City of Santa Barbara: A New Look at California Rent Controls and the Takings Clause*, 17 Ecology L.Q. 179, 208

(1990). If the park is not subject to vacancy control, however, the profit is a limited one. It represents, in essence, the value to the new tenant of saving the cost of transporting and installing his mobilehome on an empty pad. But with rent control and vacancy control, the profit also includes the value to the new tenant of renting a pad at below market rents, plus the opportunity to sell the mobilehome when he or she leaves at a price which reflects the possessory value of the rent-controlled pad.

Apartment dwellers generally lack a similar opportunity to sell the right to a rent-controlled apartment.[2] Although one hears occasionally of tenants exacting "finders fees" or "key money" from their successors (*see* McAllister, *supra*, at 208-210), generally the tenant whose tenancy is terminating owns nothing which the new tenant must acquire to move in. Apartment rental would be analogous to mobilehome rental only if tenants generally own something, such as a refrigerator, which a new tenant must acquire in order to move into a rent-controlled apartment. If that were the case, ownership of a used refrigerator, worth perhaps $600 new and now worth one-third that, might confer the right to rent an apartment indefinitely for $400 a month less than free market rents. (The buyer could also anticipate that future rent increases would be proportionately less than the increase in market rents, so the discrepancy between controlled rents and free markets rents would increase.) Such a refrigerator is worth much more than $200; in terms of the savings in rent alone, it is worth more like $20,000. Furthermore, it is worth as much to the next purchaser (even though the refrigerator as an appliance continues to depreciate), so the buyer can expect that if he leaves the

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[2] "In the apartment context, unless the jurisdiction allows the tenant to sublet his apartment without rent restrictions, tenants are unable to appropriate the economic benefit of lower rents caused by rent controls. In contrast, tenants in mobile home parks can appropriate the placement values, or at least a large part thereof." Hirsch & Hirsch, *supra*, at 448.

apartment he can sell the refrigerator for about what he paid for it, or more. So it may be worth approximately $30,000, depending on how long the buyer expects to stay in the apartment. At this point it is obvious that what is being sold is not only, or primarily, a refrigerator, but instead the right to rent and occupy the apartment.

This, as we will explain, is the situation in the mobilehome business. Here the present tenant does own something – the mobilehome itself – which the prospective tenant must acquire to get a rent-controlled space in the mobilehome park. Thus the transaction between present tenant and future tenant is more than the sale of a mobilehome; it is largely (sometimes entirely) the sale of the right to rent and occupy a pad in the mobilehome park. As explained in *Pinewood Estates v. Barnegat Tp. Leveling Board*, 898 F.2d 347, 353 (1990):

> the purchaser of a mobile home who pays a premium for the right to keep the home in a mobile home park pays for the cost of the tenancy rather than for the mobile home. Thus, the premium is nothing more than rent for the pad which, depending upon whether the purchase is financed or paid for in cash, the new tenant pays during his tenancy or in advance.

We maintain that this right to occupy a space in the owner's mobilehome park is a species of property in the nature of a leasehold, that it is the property of the park owner, not the present tenants, and that laws which transfer that right to the tenants take the property of the owner.

II. REGULATION OF MOBILEHOME PARKS IN CALIFORNIA

A. State Regulation.

Mobilehome parks in California are regulated by the California Mobilehome Residency Law, Cal. Civ. Code §§ 798-798.8. The law gives all tenants, even those renting

on a month-to-month basis, a permanent tenancy during good behavior. It does so by providing in § 798.55(b), that "The management shall not terminate or refuse to renew a tenancy" except for the reasons specified in the act. These reasons all require proof of some misconduct by the tenant, such as failure to pay rent, failure to comply with park regulations after due notice, or conviction of a crime committed on the park premises.

The Mobilehome Residency Act further gives the tenant the right to transfer the right to occupy the coach pad to the purchaser of the mobilehome. Section 798.73 provides that "The management shall not require the removal of a mobilehome from the park in the event of its sale to a third party during the term of the homeowner's rental agreement".[3] (Since under § 798.55 the park owner must renew a tenancy on request, the implied permission to require its removal after the rental term expires is meaningless.) Section 798.78 grants similar rights to the heirs, joint tenants, or personal representatives of a deceased tenant; § 798.79 grants such rights to a foreclosing legal owner or junior lienholder.[4]

Thus under the California Mobilehome Residency Law:

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[3] Under § 798.74, the park owner may not withhold approval of a mobilehome purchase "if the purchaser has the financial ability to pay the rent and charges of the park unless the management reasonably determines that, based on the purchaser's prior tenancies, he or she will not comply with the rules and regulations of the park."

[4] In the terminology used in California practice, the senior lienholder would generally be considered to be the "legal owner." (The purchaser of the mobilehome is the "equitable owner.") Thus § 798.79, by granting rights to the legal owner or junior lienholder, grants such rights to all persons who have liens on the mobilehome.

(a) a tenant may remain on a mobilehome park site indefinitely despite the expiration of his tenancy;

(b) a tenant may sell his mobilehome and require the park owner to enter into a landlord-tenant relationship with the buyer;

(c) a lender may foreclose upon a mobilehome, sell it to a third party, and require the park owner to enter into a landlord-tenant relationship with the third party; and

(d) the heirs of a tenant may sell the mobilehome to a third party and require the park owner to enter into a landlord-tenant relationship with the third party.

The California Mobilehome Residency Law, however, does not impose rent or vacancy control. Under that law, a park owner may, and often is, compelled to rent to persons not of his choosing, and for a term not of his choosing, but he is permitted to charge them the fair rental value of the leasehold. The state law, however, forms the backdrop for local rent control ordinances. Local rent and vacancy control laws may prohibit eviction of tenants without good cause, or require park owners to renew leases automatically – as the Escondido ordinance does here (Escondido, Cal., Ordinance 8850 (1988)) – but they do not need to do so because such restrictions are supplied by state law.

B. Local Regulation.

Eighty-seven local jurisdictions in California impose rent control.[5] Most limit rent control to mobilehome parks; only 13 also control apartment rents. A total of 1203 parks, with 126,848 pads, are subject to rent control. These represent about 22 percent of the mobilehome parks in California, but about 34 percent of the spaces,

[5] The figures in this paragraph are based upon an updated version of the chart in Hirsch & Hirsch, *supra*, at 408-411.

since many of the unregulated parks are quite small parks located in rural counties.

Thirty-four of those eighty-seven jurisdictions also prohibit the park owner from raising rents to market value when a mobilehome is sold.[6] This percentage has declined in the last few years as a result of the decision in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988), which led local governments to fear that vacancy control provisions would expose them to liability for a taking of property rights.[7] Some jurisdictions that prohibit a park owner from charging market rents to the purchaser of a mobilehome may, however, permit the tenant to lease his coach – thus subleasing the pad – at market rates.

[6] The *United States Department of Housing and Urban Development, Report to Congress on Rent Control*, at 9 (1991), states that "The most severe ordinances now in place in the United States allow for rent increases that are well below inflation and do not permit vacancy decontrol." But while this type of ordinance may be unusual for apartment rent control, it is common for mobilehome park rent control in California.

[7] The City of San Jose has a unique ordinance. (San Jose, Cal., Municipal Code, ch. 17.22 (1989)). In explicit response to the decision of the Ninth Circuit in *Hall v. City of Santa Barbara*, *supra*, it suspends vacancy control until the City Attorney certifies that such provisions do not constitute a compensable taking. If the city attorney so certifies, the vacancy control provision takes effect retroactively. Any park owner who raised the rent to a new owner by more than 8 percent during the period when vacancy control is suspended must refund the full amount of the increased rent (not just the amount in excess of 8 percent) to the person who owns the mobilehome when the vacancy control provision goes into effect. The entire refund goes to the person who owns the mobilehome when the City Attorney certifies that vacancy control provisions are valid; someone who bought a mobilehome during the time when vacancy control was suspended, paid higher rents, then sold it before the suspension was lifted receives no rebate.

The rent control laws vary from place to place, but virtually all are designed to ensure that rents fall below market rates, and increase at rates less than the cost of living. About half of the ordinances permit automatic annual increases. Many link those increases to changes in the consumer price index.[8] Most of those limit the automatic increase to less than 100 percent of the change in the consumer price index, which guarantees that the park owners' return in constant dollars will decline year by year. Other laws provide for automatic increases up to fixed percentage amounts, but again the amounts are almost always less than the historic rate of inflation. About half of the ordinances require application to a rent control board for any increase. Such boards are frequently dominated by tenants' groups.[9]

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[8] A few ordinances offer alternative measures for rent increases. The City of Gilroy, for example, permits the park owner to increase rents by 5 percent or 80 percent of the change in the consumer price index, whichever is less. Gilroy, Cal., Code ch. 14A, § 14A.4. The City of Oxnard permits increases up to 75 percent of the change in the consumer price index, with a minimum increase of 3 percent and a maximum of 8 percent. Oxnard, Cal., Code ch. 17.1, art. I, § 17.1-9 (1991). Some other jurisdictions have similar formulas.

[9] Although virtually all rent control ordinances purport to guarantee the park owner a fair rate of return on investment, many deny the park owner any return on capital improvements, permitting him to recover the cost only. *See, e.g.*, Escondido, Cal., Ordinance 8850 (1988). The concept of return on capital investment, moreover, although approved as a basis for setting a fair rate of return in many cases (*see, e.g., Federal Power Comm'n v. Hope Gas Co.*, 320 U.S. 591, 599-605 (1943); *Fisher v. City of Berkeley*, 37 Cal.3d 644, 680-682, 693 P.2d 261, 290, 209 Cal.Rptr. 682, 711-712 (1984), *cert. denied* 475 U.S. 1150

(Continued on following page)

Thus a mobilehome park owner has great economic incentive to convert his land to another use, or to sell to a buyer who plans to do so. To prevent this, many rent control ordinances limit conversions, imposing conditions and requiring approval by some public board. Some of these require – or permit the board to require – the park owner to buy the mobilehomes at a price which reflects the value of occupying a rent controlled site. *See, e.g.*, Santa Cruz County, Cal., Code ch. 13.30 (1980).[10]

Under these circumstances, few would invest in new mobilehome parks. The number of spaces in California mobilehome parks increased by 32.6 percent from 1970-1975, when there was no rent control, by 8.37 percent in 1975-1980 when rent control began, and by only 0.6 percent in 1980-1985. *Report of the California Assembly Committee on Housing and Community Development on SB 1241* (1989). Hirsch & Hirsch, writing in 1988, report that "virtually no new mobile home parks are being developed in California and the sale of existing parks is anything but robust." Hirsch & Hirsch, *supra*, at 417.

To encourage establishment of new mobilehome parks, the 1989 California Legislature enacted Civil Code

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(1986)), may not provide a fair rate of return for California mobilehome rents. Real estate values increased tremendously in California during the 1970's and 1980's. As a result, a rent which seems to represent a reasonable rate of return on the original investment for a park established in the 1960's may yield a return on current market value of less than 1 percent. With land devoted to most other uses earning a reasonable return on current market value, the mobilehome park owner under rent and vacancy control finds himself holding an investment of steadily diminishing value.

[10] An alternative device to prevent conversion is to zone the park for mobilehome park use only. *See, e.g.*, Redwood City, Cal., Ordinances 1130.262-1130.263 (March 6, 1989).

§ 798.45, which provides that "'new construction' . . . shall be exempt from any ordinance . . . which establishes a maximum amount that a landlord may charge a tenant for rent."[11] This law amounts to legislative recognition of the impact of rent control and vacancy control on mobilehome parks.[12] It had the desired effect of increasing investment in new parks. *See Foremost Insurance Group, supra*. But it also resulted in a two-tiered price structure: the owner who establishes a park after January 1, 1990, may charge market rents, but his competitor with an older park is limited to rents which year by year fall farther behind the free market rate. The owner of the older park is, in effect, meeting a public need for low cost housing at a sacrifice not demanded of his neighbors or his competitors.

III. ECONOMIC ANALYSIS

The mobilehome market in California is not a monopoly. As explained in *Azul Pacifico, Inc. v. City of Los Angeles, supra*, at 13601:

> There are almost 400,000 mobile home spaces in the state, as well as millions of houses, apartments and other dwellings; the various modes of housing are, with various elasticities, fungible. It is inconceivable that in such a market any person or group could artificially reduce the supply of housing and thus increase its price – the conventional definition of a monopoly. [¶] In fact, the California housing market is not an

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[11] Section 798.7 defines "new construction" as "any newly constructed spaces [for mobilehomes] initially held out for rent after January 1, 1990."

[12] For an economic analysis of the effect of rent control on the supply of housing services, *see* W. Hirsch, *Law and Economics* 82-87 (2nd ed. 1988).

> example of 'market failure' at all; it reflects the operation of normal market forces. According to the law of supply and demand, the market price of a product will rise as consumers want more of it, unless the supply increases commensurately. If the price of housing in Los Angeles is high, this is simply the free market's mechanism for ensuring efficient allocation of existing housing resources and creating incentives for an increase in the supply of housing which, eventually, will drive down the price.

Although the park owner lacks power to exact monopoly profits, he can exact what the Hirsch article refers to as a "quasi-rent." As explained in that article:

> If a coach owner is confronted with a rent increase, he may decide to move his coach to a pad in a park where the rents are lower. Assuming both pads are of equal quality, an optimizing individual chooses the least costly solution. Consequently, the coach owner will move only if the present value of the expected difference in rent exceeds the costs of transporting the coach and preparing and landscaping the new site. For example, if transportation costs and the costs of making the new site identical to the present one add up to $500, then an optimizing individual would not relocate unless the present value of the expected difference in rent exceeded $500. This value of $500 is known as the quasi-rent.

Hirsch & Hirsch, *supra*, at 428.

The Hirsch article distinguishes the quasi-rent from the "placement value," the term it uses to describe the increase in value, beyond that of the quasi-rent, which a mobilehome acquires by virtue of occupying a rent-controlled site. As it explains:

> to the extent that the landlord does not have unfettered freedom to set rents, the discrepancy between contract rent and theoretical fair value

> rent will create a value to the coach being placed in a particular park. This increment of value, which is not attributable to the physical attributes of the coach, is the placement value.

Hirsch & Hirsch, *supra*, at 429.

The increased value of the mobilehome on a rent and vacancy controlled site is not a part of the tenant's equity interest in his coach. Hirsch & Hirsch, *supra*, at 430-431. It is a benefit additional to the benefit of lower, stabilized rents. Hirsch & Hirsch, *supra*, at 431. And, as the article points out, it is a one-time benefit:

> Only the tenant in possession at the time rent control is imposed will benefit from the transfer of wealth. The subsequent tenant may get the benefit of stabilized lower rents, but he pays for this benefit in the form of a higher purchase price and, therefore, higher mortgage payments. Indeed the possibility exists that after rent control subsequent mobile home tenants may be paying the same amount or more for precisely the same housing after rent control.

Hirsch & Hirsch, *supra*, at 431.

Hirsch & Hirsch undertook a study of sales of 344 coaches in 40 different cities. They concluded that "Sales prices are on average about thirty-two percent higher in communities which have imposed rent control on mobile home pads. About $8,800 would be attributable to the increased placement value due to rent control." Hirsch & Hirsch, *supra*, at 443-444.

Evidence introduced at trial of two cases supports the conclusion that mobilehomes in communities with vacancy control can be sold for a price which includes a rent control premium. The trial court in *Azul Pacifico, Inc. v. City of Los Angeles*, heard expert evidence on the existence and amount of the rent control premium:

> Plaintiff's expert William N. Kinnard, Jr. testified that if a mobile home located and intended to remain on a pad in a rent controlled park sells

> for more than a comparable home and pad located in a non-rent controlled park, this is evidence both that the landlord's property right has been transferred from the outgoing tenant to the incoming tenant and that the outgoing tenant was paid for that transferable right. Both the plaintiff's expert Robert Foreman and the defendant's expert Robert Lea testified, after accounting for all other variables, that the homes in plaintiff's park sold at prices higher than comparable homes situated in comparable non-rent controlled parks.

740 F.Supp. 772, 776 (C.D. Cal. 1990). Based upon this testimony, the court found that the property right was transferable, had a market value, and was actually traded in a market. *Id.*

On appeal, the Ninth Circuit affirmed the district court's finding that a taking had occurred. The court of appeal summarized that finding as follows:

> The value of the possessory interest transferred by operation of law from landlord to tenant is reflected in the 'premium' the tenant receives upon sale of the coach – the amount by which the sale prices of coaches in rent-controlled parks exceed those in uncontrolled areas. One Mrs. Morrison, for example, testified that she bought a coach in Azul Pacifico's park for $77,000 and immediately sold it for $5000 and had it removed from the pad. When asked why, she responded: "The use of the land was what I paid for more than the place." Trial exhibit 432 at 7. In fact, both the plaintiff's and the defendant's experts agreed that there was a substantial premium paid on coaches in rent-controlled parks – they just calculated the amount differently.

Azul Pacifico, Inc. v. City of Los Angeles, 91 Daily Journal D.A.R. 13599 (9th Cir. Nov. 1, 1991).

In the *Hall* case itself, on remand, the federal district court for the central district of California granted summary judgment for plaintiffs upon "undisputed evidence that at least 21 buyers paid more for their mobile homes because they were guaranteed a rent controlled price." *Hall v. City of Santa Barbara*, No. 84-9506, slip op. at 6 (C.D. Cal. 1989).[13]

Thus in a mobilehome setting, the existence of a rent control premium is not merely a construct of economic theory. It is a fact, and one which, when the issue actually comes to trial, is essentially undisputed.

IV. LEGAL IMPLICATION

A. Taking Issues

Recent cases, most notably *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), have drawn a distinction between physical invasions and regulatory takings. The *Loretto* decision noted that, as in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), *reh'g denied*, 439 U.S. 883 (1978):

> the Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest. At the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause.

Loretto v. Teleprompter Manhattan CATV Corp., supra, at 426. "[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* We leave to others the question whether such a distinction leading to "dramatically different results" (*Hall v. City of Santa Barbara*, 833

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[13] This unpublished opinion appears as exhibit "A" to appellants' brief before the California Court of Appeal.

F.2d 1270, 1275 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988)), is required by the Constitution and assume, for the purpose of this brief, that the Court will adhere to this distinction.

1. Taking by Physical Invasion

In a number of cases the Court has found it useful to describe ownership of real property as a "bundle" of rights. *See, e.g., Hodel v. Irving*, 481 U.S. 704, 716 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945). "The permanent abrogation of one of those rights, without regard to its comparative value in relation to the whole, may well be sufficient to constitute a taking." *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 110, 542 N.E.2d 1059, 1067 (N.Y. 1989), *cert. denied*, 110 S.Ct. 500 (1989).

The provisions at issue here involve two related "sticks" from this bundle: the right to possession of the property (which includes the right to collect the rents), and the right to exclude others from the property. Cases have recognized that the taking of these sticks from the bundle is a taking of property. In *Hall v. City of Santa Barbara*, the court, speaking of the right to possess, observed that "The right to occupy property in perpetuity is surely the type of interest that is protected by the taking clause." 833 F.2d 1270, 1276, *citing United States v. Gen. Motors*, 323 U.S. 373 (1945). *Kaiser Aetna v. United States*, 444 U.S. 177, 180-181 (1979), held that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."

The state Mobilehome Residency Law requires the park owner to renew leases indefinitely, thus depriving him of the right to possess the mobilehome pad at the termination of the tenancy he originally agreed to. It further requires him to accept as a tenant the person to

whom the prior tenant has sold the coach, if he has the ability to pay the rent and charges. Thus the park owner's right to exclude persons is severely curtailed, and he or she may be compelled to accept tenants they consider unsuitable.

But since the state law permits the owner to bring rents to market rates when mobilehomes are sold, it does not, standing alone, constitute a physical invasion of property *without just compensation*. The owner, by charging market rents, can obtain exactly the compensation to which he would be entitled were the state to condemn a leasehold interest in the pad. The local rent and vacancy control provisions, by requiring below market rentals, add the additional element which completes the picture of an unconstitutional taking without just compensation. Those provisions, "in conjunction with the background state law rules, operated to transfer [the park owner's] property to his tenants, thus violating the takings clause." *Azul Pacifico, Inc. v. City of Los Angeles*, 91 Daily Journal D.A.R. 13599, 13600 (9th Cir. Nov. 1, 1991). "[I]t is the fact that rents cannot be raised . . . that works the unconstitutional taking . . . , not the state law." *Azul Pacifico, Inc. v. City of Los Angeles*, 740 F. Supp. 772, 776 (C.D. Cal. 1990).

Under rent control without vacancy control, a park owner must rent to existing tenants at rates below market. But without vacancy control, the system has a measure of self-correction. Tenants for various reasons will choose to sell their coach, and the park owner can utilize the opportunity to raise the rent to market levels, so his overall income never falls a great deal behind market. *See Hall v. City of Santa Barbara, supra* 833 F.2d 1270, 1279 (9th Cir. 1986). With vacancy control, however, rents never catch up; they fall further behind market rates every year. This loss in value is appropriated by the tenant when he sells his mobilehome.

In short, the park owner's rights of possession and exclusion are so diminished that he cannot prevent the physical entry onto his land of persons to whom he

would not choose to rent, and upon terms which he would not freely accept. This is the "required acquiescence" which the Court in *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 252 (1987) said "is at the heart of the concept of occupation." The third circuit described it as "a physical invasion far more pronounced than that in *Loretto*." *Pinewood Estates v. Barnegat Tp. Leveling Bd.*, 898 F.2d 347, 353 (1990). Since the owner is compensated for that invasion at rates less than fair market rents, the taking violates the Fifth Amendment.[14]

In the case at bar, however, the California Court of Appeal denied that a taking of property had occurred, and argued that the increased value of mobilehomes under vacancy control was the result of market economic forces operating on "complementary goods." *Yee v. City of Escondido*, 224 Cal.App.3d 1349, 1352, 274 Cal.Rptr. 551, 553 (1990). Citing elementary economics texts, it explained that:

> [b]ecause they are used together, there is a direct and necessarily inverse relationship between the prices for complementary goods. For example, a decrease in the price of popcorn

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[14] When property is taken by physical invasion, the owner is entitled to compensation for its fair market value, not simply a reasonable return on his original investment. (This point is obvious in the case of a direct taking; if the landowner bought property at $100,000 which is now worth $500,000, and the city takes it to build a new city hall, it must pay $500,000, not $100,000 plus a reasonable return.)

Thus as Judge Kozinski explained in *Hall v. City of Santa Barbara, supra*, 833 F.2d 1270, whether the park owners can charge rents representing a fair return on investment "is not the test in cases involving a claim of taking by physical invasion . . . . " (Id. at 1281.) Even if the rental payments compensated the owner "for the use of the land during the rental period . . . . ," the owner is "entitled to additional compensation for the taking of their property: the possessory interest in the land allegedly transferred to each of their tenants." (*Id.*)

> will cause an increase in the demand for popcorn poppers. Assuming a constant supply, this in turn will result in an increase in the price of popcorn poppers. The 'complementary good' effect is basic to a free market economy.

Id. at 1352.

Mobilehomes and mobilehome pad rentals are complementary in the sense that if the rents were to fall due to free market forces, such as the opening of additional parks, the demand for mobilehomes might increase, and price of mobilehomes could be expected to rise. But the present case involves a different phenomenon, for the increase in value adheres only to mobilehomes already in place. This is the result, not of free market forces, but of laws and ordinances which artificially tie the value of the pad and the mobilehome presently occupying it by preventing the pad owner from rejecting the mobilehome buyer or charging him a fair market rent.

The Court of Appeal's theory boils down to the proposition that if wealth transfers result from economic forces, a law that alter these forces is immune from challenge under the Takings Clause. An example will show the absurdity of this approach. Suppose the state were to say that my house and my neighbor's must be sold as a package, thus making them complementary goods, which they were not before. Then it provides that the neighbor gets all the proceeds. Under the theory of complementary goods, the value of my house will plummet. Yet both the complementarity, and the transfer of wealth, are the product not of the market, but of law, and that law clearly effects a taking of property. We maintain that the state cannot be permitted to tie goods owned by different persons together, then by a scheme of unequal regulation, permit one to realize the value of the others property. This is nothing but a complicated way of taking property from one to give it to the other.

The California Court of Appeal also pointed out that in an apartment setting, the landlord still loses value

because he cannot increase the rents to market levels, but the benefit is spread among all succeeding tenants. *Yee v. City of Escondido, supra,* at 1356. It then argued that the present case is no different because, "if the owner's property is taken by the government, it is of no constitutional consequence to whom it has been given." *Yee v. City of Escondido, supra,* at 1356.

This is in essence an argument that monetization of the rent control premium is not essential; that there is just as much of a taking if the tenant cannot capture the rent control premium in the selling price of his mobilehome, so that the benefit adheres to future tenants. The fact that something can be monetized and sold demonstrates that it is property, but the Court has recognized property interests which lack these attributes. *See Roth v. Board of Education,* 408 U.S. 564 (1972). The Court of Appeal's argument may suggest that there is a taking even if the tenant cannot sell at a premium, but it in no way denigrates our claim that there is surely such a taking when the tenant can not only enjoy but sell the possessory value of a rent-controlled pad.[15]

This point is discussed by Judge Kozinski in *Hall v. City of Santa Barbara,* 833 F.2d 1270 (9th Cir. 1986). He notes that in none of the cases upholding rent control did the landlord claim that the tenant's right to possess the property was transferable, had a market value, and was in fact traded on the open market. *Id.* at 1278. He then goes on to observe that:

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[15] Were this not a physical invasion case, the distinction would be much simpler: one could reasonably believe that vacancy control in the apartment setting may serve a significant public purpose by making low-cost housing available to the public, but vacancy control in mobilehome parks serves no such purpose. *Loretto v. Teleprompter Manhattan CATV Corp.,* 452 U.S. 419, 426 (1982), however, teaches that a physical invasion is a taking without regard to the public interests it may serve.

> This is not a minor difference; it is crucial. The fact that the tenant can sell his interest to third parties drastically affects the economic realities of the landlord/tenant relationship. The typical rent control statute modifies the landlord/tenant relationship somewhat to protect tenants from perceived evils of the free-enterprise system. . . . By contrast, the Santa Barbara Ordinance, as it is alleged to operate, changes the fundamental relationship between the parties, giving landlord and tenant complementary estates in the same land. On the one hand, the landlord loses forever a fundamental aspect of fee simple ownership: the right to control who will occupy his property and on what terms. On the other hand, the tenant gets an interest that he can liquidate and take with him when he leaves the property.

Id. at 1279.

B. Regulatory Taking

Although we maintain that vacancy control ordinances constitute a taking of property by physical invasion, the invalidity of the ordinances can also be demonstrated under a theory of regulatory taking.

In *Penn Central Transportation Co. v. City of New York*, the Court acknowledged that it has "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." 438 U.S.104, 124 (1977), *reh'g denied*, 439 U.S. 883 (1978). It identified, however, "several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to

which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. [Citation omitted]. So, too, is the character of the governmental action." *Id.*

The impact of the regulation upon the claimant, and his investment-backed expectation, is clear. The park owners invested in mobilehome parks expecting that they could choose their tenants (except as limited by anti-discrimination laws), that they could charge market rents, and that, if the market value of the property increased, they could capitalize on that increase either through increasing the rents to reflect the increased market value or selling the property. The effect of the rent and vacancy control laws, especially when joined to anti-conversion ordinances (see *ante*, at 11), is to lock the park owner into a permanent investment yielding below market rents.

In determining whether an ordinance constitutes a regulatory taking, Chief Justice Rehnquist, dissenting in *Penn Central Transportation Co. v. City of New York*, suggested that a critical question might be whether the ordinance imposed affirmative duties on the landowner. 438 U.S. 104, 146 (1977), *reh'g denied*, 439 U.S. 883 (1978); *see also Seawall Associates v. City of New York, supra*, at 102. In that connection it is significant that the mobile park owner is subject not only to a duty not to prevent the sale of the mobilehome at a premium price; he owes affirmative duties to admit the purchaser to the mobilehome park, to enter into a lease with him, and to maintain the facilities and perform the services required by the lease and by state law.

The second part of the test examines the character of the governmental action. *Penn Central* noted that when a state tribunal has "reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted" (438 U.S. at p. 125), the Court has generally upheld land use restrictions. The inquiry suggested by such language

is similar to that under the first part of the test contemplated by *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980): whether the ordinance substantially advances legitimate state interests.

Thus the inquiry breaks down into two components – what interests does the measure advance, and are they legitimate? The inquiry resembles that involved when the Court inquires whether an economic regulation violations the Due Process or Equal Protection clauses. But the opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), explains the crucial difference in the standards employed. In a takings case, wrote Justice Scalia, "We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, *Agins v. Tiburon*, 447 U.S. 225, 260 (1980), not that 'the State *"could rationally have decided"* that the measure adopted might achieve the State's objective.' " *Nollan v. California, supra*, at 834, fn.3.

The Escondido ordinance, being an initiative measure, lacks a statement of purpose. We presume its purpose is to prevent excessive rents arising from a shortage of rental property; that is the basis upon which California courts have upheld rent control in past cases (*see, e.g., Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 160, 550 P.2d 1001, 130 Cal.Rptr. 231), and the stated reason for most rent control ordinances in California. But the vacancy control provision of the ordinance does not further this purpose. As the court said in *Azul Pacifico, Inc. v. City of Los Angeles*, 91 Daily Journal D.A.R. 13599, 13602 (9th Cir. Nov. 1, 1991):

> The vacancy control ordinance does nothing to protect mobile home buyers from the rigors of the marketplace. Instead it transfers the value of rent-controlled space . . . from the mobile park landlord to the tenant. We are unable to see how this transfer of wealth from one group of citizens to another can serve any rational governmental purpose.

Indeed, as we have seen, the new tenant is probably worse off because of vacancy control. Instead of paying a higher rent each month, he must come up with the cash equivalent of the rent at the onset of the tenancy, and in all likelihood borrow money at interest to do so.[16]

Azul Pacifico, Inc. v. City of Los Angeles, suggested that vacancy control laws serve a different purpose – "protecting existing tenants from being forced to sell their coaches at distress-sale prices in the event landlords were to set rents for new tenants so high that no one would want to buy the coach." *Id.* at 13602. But a park owner under rent control without vacancy decontrol, has no reason to discourage prospective tenants from purchasing mobilehomes in his park; he cannot increase rents until the coaches are sold. To the contrary, he will set rents for new tenants at levels calculated to encourage them to purchase mobilehomes in his park.

Tenant groups sometimes argue that park owners may threaten to charge prohibitive rents for vindictive purposes, even though this is not to their economic self-interest.[17] (Tenants' more realistic concern is that obsolescence and depreciation will greatly reduced the value of

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[16] In addition, both present and future tenants suffer from the decline in the quality of housing incident to rent control. *See* Olsen, *What do Economists Know About the Effect of Rent Control on Housing Maintenance?*, 1 The Journal of Real Estate Finance and Economics 295-307 (1988). This decline is, of course, more severe under vacancy control. *See United States Department of Housing and Urban Development, Report to Congress on Rent Control*, at 21 (1991).

[17] Tenant groups also occasionally claim that park owners threaten to charge prohibitive rents to prospective purchasers with the goal of forcing the tenant to sell his coach to the park owner. But the park owner's ability to do so is limited by the ability of the tenant to remove the coach and sell it as a unit separate from the pad. If this costs about $1000-$3000, as indicated by Hirsch & Hirsch, *supra*, at 404-405, the park owner cannot force the price down by more than this figure.

their 20-30 year old mobilehomes unless the sale of the mobilehome can be tied to a guaranteed below-market rent.) But the vacancy control ordinances are not designed to combat this danger. With rare exceptions, the ordinances, including Escondido's, do not attempt to ban only prohibitive or vindictive rates. Instead most, including Escondido's, prohibit any rent increase upon sale of the mobilehome, even though existing rents are known to be below market rates.

We submit that the fit between a goal of preventing a theoretical vindictive owner from threatening to charge rents in excess of market, and a provision which bars all owners from charging market rents, is insufficient to meet the *Nollan* standard. That test, as we have noted, requires that the enactment "substantially advance" the legislative purpose (*Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987)), and directs an inquiry into the "nexus" between the means chosen and the end desired. *Id.* at 837. Here the ordinance prohibits predatory prices by an occasional park owner only by prohibiting market pricing by all. This is overbreadth carried to a ridiculous extreme, and makes it clear that preventing vindictive pricing is not the real purpose of the ordinance.

The one purpose the vacancy control law does substantially advance is to transfer the rent control premium – the power to collect the capitalized value of a portion of future rents – to the tenants in place when the ordinance is enacted. Since these tenants purchased their mobilehomes before vacancy control went into effect, they did not have to pay a rent control premium themselves. This increase in value of the tenants' mobilehomes when vacancy control is enacted is a pure windfall to the tenants. The prospect of gaining such a windfall, not the protection of future tenants, is the real motivating force behind vacancy control laws. Indeed the proponents of the Escondido initiative (Proposition K) circulated a handbill urging tenants to support the measure because,

among other things, it will "dramatically increase the value of your home." (Ex. A, attached to this brief.)

Is increasing the value of tenants' mobilehomes at the park owners's expense a "legitimate" state interest as that term is used in *Nollan*? Our research has disclosed no cases answering that question, but it seems to have been generally assumed that if the state wants to take a property interest from one person to give to another, it must pay for the property, even if the transfer serves some overriding goal of redistribution of income. In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), for example, the Court held that Hawaii could condemn the property of the landlord, paying him fair market value, and give it to his tenants as part of a land reform program. But no one would maintain that Hawaii could have taken the property without paying for it.

The community of Escondido may legitimately seek to improve the lot of mobilehome tenants. But this public purpose cannot constitutionally be achieved by putting a disproportionate burden on the park owners.

B. Substantive Due Process

In *Lawton v. Steele*, 152 U.S. 133, 137 (1894), the Court declared that:

> To justify the state in thus interposing its authority on behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Fifty-eight years later in *Goldblatt v. Hempstead*, 396 U.S. 590, 594-595 (1962), the Court quoted this passage as "still valid today", and relied on that test in upholding a land use regulation.

If we follow this language closely, and do not reduce it to a one step inquiry into whether the State "could

rationally have decided" the measure adopted might achieve its objective (*Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981)), it mandates an inquiry not only into the rationality of the measure, but also whether it serves the interests of the public generally, as distinguished from those of a particular class. Such an inquiry here would lead to the conclusion that the vacancy control provision does not; it served only the interests of present owners of mobilehomes in Escondido mobilehome parks. The *Lawton* test would also require inquiry into whether the vacancy control provisions were "unduly oppressive upon individuals." Here the ordinance requires park owners to lease their property perpetually for figures which will year by year fall further behind market rates, while permitting the tenants to collect and keep for themselves the capitalized value of the difference between regulated and market rents. Thus a court could well find mobilehome park vacancy control laws invalid without looking into the rationality of those measures.

But even if we focus solely on the question of rationality, the ordinance may fail the test. Upon remand following the Ninth Circuit decision in *Hall v. City of Santa Barbara*, 833 F.2d 1270, *cert. denied*, 485 U.S. 940 (1988), the federal district court heard evidence and concluded that:

> the section of the Ordinance that forbids rent increases of more than 10 percent when a tenant sells his or her mobile home or moves from the park *is not rational*. First of all, it does nothing to protect "the continued ability of park residents to afford to maintain residency in such parks." [Quoting the purposes of the Santa Barbara ordinance] . . . As long as the tenant is protected for the duration of his or her tenancy, the threat of being uprooted due to protective rents is gone.

> Secondly, to the extent that the purpose of the Ordinance is to provide low and moderate income housing in general, the Ordinance wholly fails to achieve that purpose. It does nothing to keep low and moderate income housing available to subsequent tenants as those subsequent tenants are paying high premiums for the coaches they buy from the former tenants.

Hall v. City of Santa Barbara, No. 84-9506, slip op. at 10-11 (C.D. Cal. 1989) (Emphasis added). After noting that the ordinance placed no limits on the amount for which tenants could sell their mobilehome, the trial court concluded that "the vacancy provision of the Ordinance is irrational and unconstitutional." *Id.*

We have no comparable trial record here. Instead the question is whether plaintiffs can get to trial, whether they will ever have the opportunity to present evidence, like that presented in *Hall*, to show the irrationality of the ordinance. The finding of the district court in *Hall* suggests that if given that opportunity, plaintiffs may be able to show that the vacancy control provisions of the Escondido initiative ordinance fail even the rationality test of substantive due process.

CONCLUSION

For the reasons stated above, the United States Supreme Court should reverse the judgment of the California Court of Appeal, and permit plaintiffs to prove that the vacancy control provision of the Escondido ordinance takes their property without just compensation and denies them due process of law.

DATED: November 26, 1991

Respectively submitted,

MICHAEL A. WILLEMSEN
DAVID SPANGENBERG
By: MICHAEL A. WILLEMSEN
Counsel of Record

EXHIBIT A

DECLARATION OF
CHARLES E. du PONT, JR.

I, Charles E. du Pont, Jr., hereby declare and state:

1. I am over 18 years of age and am one of the general partners of Vista Verde, Ltd., a California Limited Partnership, which is the owner of Vista Verde Mobile Estates (the "Park"), a 100-space mobile home park in Escondido, California.

2. Vista Verde, Ltd. has owned the Park since September 1983.

3. The following facts are true of my own personal knowledge and if called as a witness, I could and would testify truthfully thereto:

> The attached Exhibit A, EMPAC Newsletter, Vol. II, No. 6, was distributed to the tenants in the Park in May 1988 just prior to the election in Escondido on June 7, 1988, at which time Proposition K, The Escondido Rent Stabilization Ordinance was on the ballot. Copies of said Newsletter were placed in the tenants' mailboxes throughout the Park.

4. I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED THIS 16th day of November, 1991 at Solana Beach, California.

/s/ Charles E. du Pont, Jr.
CHARLES E. du PONT, JR.

App. 2

EMPAC NEWSLETTER Vol. II No. 6

- You Can Stabilize Your Rent
- You Can Dramatically Increase The Value Of Your Homes

Just Vote – June 7th

VOTE YES ON "K"

VOTE NO ON "N"

We Also Must Have Our Friends On The City Council, So,

RE-ELECT JERRY HARMON

ELECT KRIS MURPHY

ELECT CARLA DEDOMINICIS

Please call your friends outside your mobilehome park and ask them to vote also.

Attend the last general meeting before the June 7th elections:

May 24th 6:30 pm Turrentine Room at the library.

Send your contributions today

Name _____ Mail to:
EMPAC
Address _____ 2550-1 East Valley ~~Pk~~wy